

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

LARRY GREEN	:	CIVIL ACTION
	:	
v.	:	
	:	
ACME MARKETS, INC.	:	NO. 05-3427

MEMORANDUM AND ORDER

Fullam, Sr. J.

May 24, 2006

Defendant has moved for summary judgment in this employment discrimination case. Because under the facts as viewed most favorably to him, Plaintiff cannot establish that his employer discriminated against him on the basis of age or disability, I will grant the motion.

Plaintiff worked for Acme Markets for approximately 18 years. His problems with his employer apparently began after Acme was acquired by Albertsons, Inc. Albertsons offered a one-time buyout to employees with at least 20 years of service. Albertsons also brought in a new manager who was, in Plaintiff's view, abusive. This new manager forced Plaintiff to work much longer hours and informed Plaintiff that he had a "bulls-eye" on him and that he was "'54 vintage", "old", and "washed up". Larry Green Dep. at 67. These statements occurred approximately two years before Plaintiff left Acme. During a later argument between Plaintiff and the manager, the manager referred to Plaintiff and other employees as "Acme trash." Shortly after that altercation Plaintiff informed the manager that he suffered

from sleep apnea, and requested accommodation in the form of reduced hours, which the manager denied. Some two months later, on September 25, 2003, Plaintiff resigned to accept a position with a another company at slightly less pay and with a more agreeable work schedule. After resigning from Acme, Plaintiff filed a charge with the Pennsylvania Human Relations Commission alleging constructive discharge and discrimination based upon age (56) and disability (sleep apnea).

Plaintiff has produced deposition testimony from other employees who expressed their subjective belief that Albertsons wanted to force out "people with many years with the company" and replace them with younger workers. Dep. of Gary Fuddy at 37-38. The 2001 buyout offer is described as evidence of that desire. Defendant, however, has produced un rebutted evidence that employees who accepted the offer were sometimes replaced by younger workers, sometimes replaced by older workers, and sometimes not replaced at all.

The allegations in this case are similar to those in Duffy v. Paper Magic Group, Inc., 265 F.3d 163 (3d Cir. 2001). As in that case, "although the above allegations indicated that [Plaintiff] experienced stress and discomfort on the job, [he] did not provide sufficient evidence that [he] was constructively discharged or otherwise suffered an adverse employment action." Id. at 168. Especially in light of the fact that Plaintiff never

filed any complaint pursuant to Defendant's anti-discrimination policies, his age discrimination claim cannot stand.

Summary judgment also must be granted on Plaintiff's disability claim. I need not decide whether sleep apnea can qualify as a disabling condition because Plaintiff did not begin treatment for his condition until about or after he resigned, he has not shown that he suffered an adverse employment action related to his condition, and he did not avail himself of Defendant's complaint procedures.

An order follows.

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O R D E R

AND NOW, this 24th day of May 2006, upon consideration of Defendant's Motion for Summary Judgment, the response thereto, and after hearing the arguments of counsel on May 15, 2006, it is hereby ORDERED that:

Defendant's Motion is GRANTED. Summary Judgment is hereby entered IN FAVOR OF Defendant, ACME MARKETS, INC. and AGAINST Plaintiff, LARRY GREEN.

BY THE COURT:

/s/ John P. Fullam
Fullam, Sr. J.